No. 15-274

Supreme Court, U.S.
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In The
Supreme Court of the United States

WHOLE WOMAN'S HEALTH, et al.,

Petitioners,

v.

JOHN HELLERSTEDT, M.D., Commissioner of the Texas Department of State Health Services, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF MORE THAN 450 BIPARTISAN AND BICAMERAL STATE LEGISLATORS AND LIEUTENANT GOVERNORS IN SUPPORT OF THE RESPONDENTS AND AFFIRMANCE OF THE FIFTH CIRCUIT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are more than 450 current bipartisan and bicameral legislators[2] along with lieutenant governors from states that maintain similar abortion regulations to those at issue in Texas House Bill (HB) 2.[3] As

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[1] Pursuant to this Court's Rule 37.3(a), *Amici* have consent to file this brief from both parties; written consent accompanies the brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

[2] The full list of state legislators and lieutenant governors appears in the appendix, listed by state.

[3] These states are Alabama, Arizona, Louisiana, Kansas, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, and Virginia. *See, e.g.*, ALA. CODE § 26-23E-9 (requiring that abortion or reproductive health centers comply with "ambulatory health care occupancy" standards); ALA. CODE § 26-23E-4 (requiring abortion providers to have staff privileges at an acute care hospital) (in litigation); ARIZ. REV. STAT. § 36-449.03 (requiring abortion clinics to meet comprehensive standards related to physical facilities, supplies and equipment, personnel, patient screening, the abortion procedure, recovery rooms, and reporting); LA. REV. STAT. §§ 40:2175.1 *et seq.* (requiring comprehensive licensing standards); LA. REV. STAT. § 40:1299.35.2 (requiring abortion providers to have active admitting privileges at a local hospital) (in litigation); KAN. ADMIN. REGS. §§ 28-34-126 *et seq.* (providing standards related to administration, professional qualifications, patient and employee testing, and physical-plant specifications); KAN. ADMIN. REGS. § 28-34-132 (requiring abortion providers to have admitting privileges at a local hospital); MISS. CODE § 41-75-1 (requiring abortion providers to have admitting privileges at a local hospital) (in litigation); MO. REV. STAT. § 197.200 (defining "ambulatory surgical center" to include facilities where five or more first-trimester abortions are performed per month); OKLA. STAT. tit. 63, § 1-748

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such, *Amici* have a unique interest in this case; any decision herein will have a direct impact on the laws they have already enacted in their respective states, some of which are currently in litigation.

As representatives of the people of their respective states, *Amici* also have an interest in ensuring that proper deference is afforded to their legislative decisions and actions. This Court has clearly provided that state and federal lawmakers are given "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). However, what Petitioners urge here is actually a rejection of this Court's precedents and the implementation of a strict scrutiny standard for reviewing abortion regulations. This Court rejected strict scrutiny in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and it must reject Petitioners' proffered standard as well.

(requiring abortion clinics to meet standards related to supplies and equipment and requiring abortion providers to have admitting privileges at a local hospital) (in litigation); 35 PENN. STAT. § 448.806 (requiring abortion facilities to meet the same standards as ambulatory surgical facilities); TENN. CODE § 68-11-201 (defining "ambulatory surgical treatment center" to include most abortion providers) (in litigation); TENN. CODE § 39-15-202 (requiring abortion providers to have admitting privileges at a local hospital) (in litigation); VA. CODE § 32.1-127 (classifying facilities in which five or more first trimester abortions per month are performed as a category of "hospital" and regulating the standards of health, hygiene, sanitation, construction, and safety).

Indeed, this Court has repeatedly affirmed that states have an interest in protecting maternal health from the outset of pregnancy. *See Gonzales*, 550 U.S. at 145; *Casey*, 505 U.S. at 846 (both *citing Roe v. Wade*, 410 U.S. 113 (1973)). Petitioners ignore this important state interest and are attempting to reverse the burden by requiring the State to prove the effectiveness of a law in meeting its interest in protecting maternal health. As lawmakers, *Amici* urge this Court to reject Petitioners' transparent ploy to undermine the discretion that must be afforded to state lawmakers seeking to advance this interest, and affirm the Fifth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

This case is about more than applying ambulatory surgical center standards and admitting privileges to Texas abortion clinics. While these provisions of Texas House Bill (HB) 2, enacted in 2013, are certainly front and center in the case, what is at stake is the very standard that federal courts will use in reviewing abortion regulations.

Contrary to this Court's abortion jurisprudence, the Petitioners are essentially arguing for a strict scrutiny standard of review for abortion regulations. What they ignore – and the Fifth Circuit got right – is that this Court has explicitly rejected this approach and has repeatedly affirmed the states' interests in protecting maternal health and regulating the medical

profession through commonsense abortion regulations. *See* Part I, *infra*.

In both *Gonzales v. Carhart* and *Planned Parenthood v. Casey*, this Court affirmed *Roe v. Wade*'s "essential" holding, which explicitly included not only the woman's "right" to "choose to have an abortion" without "undue interference from the State," but also "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman. " *Gonzales*, 550 U.S. at 145; *Casey*, 505 U.S. at 846 (both citing *Roe*, 410 U.S. 113).

Roe itself provides explicit direction as to the breadth of this legitimate state interest. In *Roe*, the Court held that the State's legitimate interest in regulating abortion to ensure "maximum safety" for the woman "obviously extends at least to [regulating] the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise." *Roe*, 410 U.S. at 150. This language validates both the provisions in HB 2 that Petitioners challenge and the states' interests in protecting maternal health. *See* Part I, *infra*.

Significantly, this Court has already rejected the application of the standard of review urged by Petitioners. In *Casey*, this Court overruled previous decisions that utilized a strict scrutiny standard, and instead delineated the "undue burden" standard, with "guiding principles" to assist courts in its application.

See Part I, *infra*. Importantly, nowhere in this Court's abortion jurisprudence, and particularly its "guiding principles" for the application of the undue burden standard, has it ever required a state to prove that a regulation "actually serve[s] the government's interest in promoting health." Petitioners' Question Presented I.a. Such a condition is just another way of requiring a state to prove that a regulation is narrowly tailored to achieve the State's interest – *i.e.*, strict scrutiny. *See* Part I, *infra*.

Instead, through *Casey* and *Gonzales*, this Court has set forth the threshold standard for reviewing abortion regulations: a regulation enacted to protect maternal health is valid where there is a rational basis for its enactment and it does not pose an undue burden. *See id.* Petitioners' proffered standard would make the rational basis prong of this Court's test meaningless. That cannot be what this Court intended.

Petitioners also ignore that the Legislature must be given wide discretion to act when there is medical disagreement. In fact, such disagreement provides "sufficient basis" for a court to find, in a facial attack against an abortion regulation, that there is no undue burden. *Gonzales*, 550 U.S. at 163, 164; *see also* Part II, *infra*. This Court has referred to such deference as the "traditional rule," even in the abortion context. *Gonzales*, 550 U.S at 163. Such broad discretion has been afforded repeatedly to state legislatures throughout this Court's jurisprudence, and it has been echoed in the Fourth, Fifth, and Eighth Circuits

as well. On the other hand, the Seventh and Ninth Circuits have strayed from this Court's precedents and adopted a strict scrutiny approach. *See* Part II, *infra*.

The Petitioners urge the adoption of a strict scrutiny standard because they cannot meet the legal standards established by this Court in *Roe*, *Casey*, and *Gonzales*. The legislative record and the record before the trial court confirm that the Fifth Circuit afforded proper deference to the state legislature. As such, the most that Petitioners can demonstrate is that there is disagreement in the medical community – a "disagreement" which must be resolved in favor of the State. *See* Part III, *infra*.

ARGUMENT

I. The Legislature has an interest in protecting maternal health from the outset of pregnancy, and a regulation enacted to protect maternal health is valid where there is a rational basis for its enactment and it does not pose an undue burden

In both *Gonzales v. Carhart* and *Planned Parenthood v. Casey*, this Court affirmed *Roe v. Wade*'s "essential" holding, which explicitly included not only the woman's "right" to "choose to have an abortion" without "undue interference from the State," but also "the principle that the State has legitimate interests from the outset of the pregnancy

in protecting the health of the woman. " *Gonzales*, 550 U.S. at 145; *Casey*, 505 U.S. at 846 (both citing *Roe*, 410 U.S. 113). *Roe* "was express in its recognition of the State's 'important and legitimate interests in preserving and protecting the health of the pregnant woman. '" *Casey*, 505 U.S. at 875-76.

Roe itself provided explicit instruction as to the breadth of the State's legitimate interest, stating, "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe*, 410 U.S. at 150. The Court found that the State's legitimate interest in regulating abortion to protect maternal health "obviously extends at least to [regulating] the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that may arise." *Id.*

Preceded by the phrase "at least," these examples clearly set a floor, not a ceiling, of the "obvious" interests and deference a state maintains in protecting maternal health. Notably, the Court's list of the minimum "obvious" examples of measures advancing women's health goes beyond regulating the abortion procedure itself and extends to regulations that would ensure the qualifications of the physician and the safety of care provided in a facility. Simply, the State's interest in maternal health is comprehensive

and deserving of wide deference.[4] *See also* Part II, *infra*.

In *Casey*, the Court elaborated on the "essential" holding in *Roe* by explaining that the woman's "right" is not so unlimited that it is absolute. *Casey*, 505 U.S. at 869.[5] In fact, the Court termed it an "overstatement" to describe it as a "right to decide whether to have an abortion 'without interference from the State.'" *Id.* at 875.[6] Rather, from the outset of pregnancy, a state can show concern for maternal health and the life of the unborn child and act to further those interests. *Id.* at 846.

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[4] The Court also expressed concern in *Roe* with what it called illegal "abortion mills," noting that their reported negative impact on women's health "strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed." *Roe*, 410 U.S. at 150.

That the Court intended abortion clinics to abide by health and safety regulations is confirmed in *Connecticut v. Menillo*, where it stated, "Jane Roe had sought to have an abortion 'performed by a competent, licensed physician, under safe, clinical conditions,' and our opinion recognized only her right to an abortion *under those circumstances*." 423 U.S. 9, 10 (1975) (emphasis added).

[5] *See also Casey*, 505 U.S. at 873 (" not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right").

[6] The Court later explained that *Roe* protects the "right to decide to terminate a pregnancy free of *undue* interference by the State." *Id.* at 887 (emphasis added). *See also id.* at 875 ("Not all government intrusion is of necessity unwarranted.").

This Court explained in *Casey* that after *Roe*, many judicial decisions failed to give adequate deference to a state's interest in maternal health and instead "decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." *Id.* at 871. However, the Court then held that "[n]ot all of the cases decided under that [strict scrutiny] formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her." *Id.* The decision was clear: the strict scrutiny standard has no place in the review of abortion regulations.[7]

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[7] This Court did not apply strict scrutiny in *Roe* or *Doe v. Bolton*, 410 U.S. 179 (1973), nor between *Roe* and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). In her dissent in *Akron*, Justice O'Connor provided a detailed analysis demonstrating that the Court between *Roe* and *Akron* had not treated abortion as a "fundamental right," nor consistently applied the strict scrutiny standard that accompanies a fundamental right. She stated:

> The Court has never required that state regulation that burdens the abortion decision be "narrowly drawn" to express only the relevant state interest. In *Roe*, the Court mentioned "narrowly drawn" legislative enactments, 410 U.S., at 155, but the Court never actually adopted this standard in the *Roe* analysis.

Akron, 462 U.S. at 467 n.11 (O'Connor, J., dissenting). *See also Carey v. Population Services International*, 431 U.S. 678, 704 (1977) (Powell, J., concurring) (stating that neither *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), nor *Doe v. Bolton* refer to the "'compelling state interest' test,"

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Rejecting these previous decisions that invalidated regulations "which in no real sense deprived women of the ultimate decision," the plurality in *Casey* introduced the "undue burden" standard: only where a state regulation imposes an undue burden on a woman's ability to choose abortion does the State overreach. *Id.* at 874. The Court elaborated:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

Id. at 877 As the Court further noted, "[a] particular burden is not of necessity a substantial obstacle." *Id.* at 887

Given that the "undue burden" standard established a relatively new framework for evaluating abortion regulations, the plurality in *Casey* provided "guiding principles" to help direct the federal courts as to what constitutes a "substantial obstacle":

a) What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.

b) Regulations which do no more than create a structural mechanism by which the State may express profound respect

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and noting that *Doe* used the "reasonably related" test); *Doe*, at U.S. 179, 195 (applying a "legitimately related" test).

> for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.
>
> c) Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.
>
> d) Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Id. at 877-78 (citations omitted). Significant here is what the Court did *not* include as a "guiding principle": the Petitioners' claim that a state must prove the effectiveness of its regulation in order to successfully defeat an undue burden challenge.

Further underscoring its determination that the use of strict scrutiny is improper and that states may enact abortion regulations aimed at protecting the life of the mother or unborn child, the Court gave yet another "summary" of its undue burden standard, which included the following factors:

> a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis. An undue burden exists if its purpose or effect is to place a substantial obstacle in

the path of a woman seeking an abortion before the fetus attains viability.

b) We reject the rigid trimester framework of *Roe v. Wade*. [T]hroughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

c) *As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion.*

d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

Id. at 878-79 (emphasis added).[8] Equating the regulation of abortion to the regulation of any medical

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[8] The Court also provided an additional summary factor which dealt with regulations aimed at protecting the unborn child after viability, which is not applicable here. *Casey*, 505 U.S. at 879.

procedure, the Court held that only "unnecessary" regulations which have the "purpose or effect of presenting a substantial obstacle to a woman" pose an undue burden. *Id.* at 878. Importantly, nowhere in the Court's enunciation of the undue burden standard – neither in its "guiding principles" nor in its "summary" – did the Court direct that a state regulation aimed at furthering the health or safety of a woman seeking an abortion be preemptively *proven* by the State to actually meet that laudable goal.

In sum, strict scrutiny was rejected in *Casey*, and regulations which serve a rational purpose and do not place a substantial obstacle in the way of a woman's decision are constitutional.

In *Gonzales*, the Court elaborated on the significant state interests that support an abortion regulation and clarified that a rational basis inquiry does, in fact, have a place in reviewing abortion regulations. After recognizing that the State "has an interest in protecting the integrity and ethics of the medical profession" and has a "significant role to play in regulating the medical profession," the Court determined, "[w]here it has a *rational basis* to act, and it *does not impose an undue burden*," the State may enact abortion regulations "in furtherance of its legitimate interests." *Gonzales*, 550 U.S. at 157, 158 (citations omitted) (emphasis added). The Court added that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Id.* at 166.

Thus, the first step in evaluating the constitutionality of an abortion regulation aimed at protecting women's health is to determine whether the State has "a rational basis to act." *Id.* at 158.[9] Then, once a rational basis has been established, a court must determine whether the regulation imposes an undue burden on women seeking abortions. *Id.*

At no point has the Court required a state to prove whether an abortion regulation "actually serve[s] the government's interest in promoting health." Petitioner's Question Presented I.a. Indeed, such an inquiry is simply another way of asking the Court to evaluate whether a regulation is narrowly tailored to achieve the State's interest – the very strict scrutiny review this Court has explicitly rejected. *See Casey*, 505 U.S. at 871.[10]

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[9] Under the rational basis standard of review, courts must presume that a law in question is constitutional and sustain it so long as the law is rationally related to a legitimate state interest. *Heller v. Doe*, 509 U.S. 312, 320 (1993). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* (citation omitted). In other words, the test provides an incredibly high level of deference to the State, placing the burden on the plaintiffs challenging a law to prove that the State has absolutely no rational justification for enacting it. *See also* Part II, *infra*.

[10] The Fifth Circuit has a history of properly applying this Court's rational basis and undue burden review. *See Whole Woman's Health v. Lakey*, 769 F.3d 285, 293 (5th Cir. 2014) ("Following *Carhart* and *Casey*, our circuit conducts a two-step approach, first applying a rational basis test, then independently determining if the burden on a woman's choice is undue."); *id.*

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II. The Legislature must be given wide discretion when there is medical disagreement, and according to *Gonzales* such disagreement provides "sufficient basis" to conclude that there is no undue burden

In addition to the guidelines provided in *Casey* for evaluating whether a regulation poses an undue burden, this Court explicitly held in *Gonzales* that state and federal lawmakers are given "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163. In fact, when there is medical disagreement regarding the alleged risks associated with a regulation, that uncertainty "provides a *sufficient basis* to conclude in [a] facial attack that the [regulation] *does not impose an undue burden*." *Id.* at 164 (emphasis added).

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at 297 (" the district court's approach ratchets up rational basis review into a pseudo-strict-scrutiny approach by examining whether the law advances the State's asserted purpose. Under our precedent, we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry."); *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott* (*Abbott II*), 748 F.3d 583, 594 (5th Cir. 2014) ("Nothing in the Supreme Court's abortion jurisprudence deviates from the essential attributes of the rational basis test. "); *id.* at 595 (" . the State is not required under rational basis review to choose the least restrictive means to achieve a legitimate goal"); *id.* at 596 (rejecting the Seventh Circuit's use of strict scrutiny in evaluating abortion regulations and stating, "[t]he first step in the analysis of an abortion regulation, however, is *rational* basis review, not *empirical* basis review") (emphasis in original).

In *Gonzales*, the plaintiffs alleged that the federal prohibition on partial-birth abortion created health risks to women. This Court noted that there was documented medical disagreement in the trial court records regarding any alleged risks. *Id.* at 162. Despite the fact that all three district courts weighed the medical disagreement in favor of the plaintiffs,[11] this Court reversed and held that its precedents "instruct" that the prohibition "survive" the facial challenge because of the wide discretion given to state and federal lawmakers. *Id.* at 163.

This Court further held that the "law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Id.*[12] Clearly, when professionals within the

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[11] Even the more "skeptical" district court for the Southern District of New York found that "a significant body of medical opinion" held that the partial-birth abortion procedure had some safety advantages. *Gonzales*, 550 U.S. at 162-63. The fact that this Court then reversed those lower court decisions demonstrates that it provided wide discretion to lawmakers even in the face of purported medical evidence favoring the plaintiffs.

[12] *See also id.* at 164 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."). This Court also cited *Webster v. Reproductive Health Services* for the proposition that this Court (or any other federal court, for that matter) should not serve as the country's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Id.* (citing *Webster*, 492 U.S. 490, 518-19 (1989)). If there is medical disagreement, a state legislature is in the best position to evaluate the medical

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medical community disagree, the State is free to enact regulations aimed at protecting patient health, and the State is not required to prove that the resulting regulations will achieve the maximum safety it seeks. Further, the testimony of abortion providers should not be more heavily weighed than that of physicians testifying in favor of a regulation. If legitimate medical disagreement exists, a regulation must "survive" a facial attack. *Id.*

Such deference to state officials was not a new or anomalous construct when recognized in *Gonzales*. In fact, the Court cited a long list of previous decisions[13] and referred to the wide discretion standard as a "traditional rule." *Id.*

Even in *Roe*, this Court made clear the broad discretion the State reserves to ensure maximum patient safety, which "obviously" includes regulations related to the performing physician and the facilities involved. *See Roe*, 410 U.S. at 150; *see also* Part I,

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data and enact commonsense regulations to enhance patient safety.

[13] This Court cited the following: *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997); *Jones v. United States*, 463 U.S. 354, 364-65 n.13, 370 (1983); *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926); *Collins v. Texas*, 223 U.S. 288, 297-98 (1912); *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905). The Court also cited *Stenberg v. Carhart*, 530 U.S. 914, 969-72 (2000) (Kennedy, J., dissenting); *Marshall v. United States*, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad.").

supra. HB 2's admitting privileges requirement and mandate that abortion clinics meet the same standards as ambulatory surgical centers – which simply require that abortion clinics meet commonsense standards for safety and cleanliness – clearly fall within the regulation of abortion providers and facilities approved in *Roe*.

Cases following *Roe* echoed this deference to the state legislatures. In the 1983 case *Simopoulos v. Virginia*, this Court held that, in view of a state's interest in protecting the health of its citizens, it "necessarily has considerable discretion in determining standards for the licensing of medical facilities." 462 U.S. 506, 516 (1983). Significantly, in *Simopoulos*, this Court upheld a second-trimester ambulatory surgical center provision, even under *Roe*'s restrictive, subsequently rejected trimester framework. *See generally, id.*[14]

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[14] Also noteworthy is this Court's citation to the *Standards for Obstetric-Gynecologic Services* of the American College of Obstetricians and Gynecologists (ACOG) at the time:

> Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's office and outpatient clinic or the free-standing and hospital-based ambulatory setting.

Simopoulos, 462 U.S. at 517 (citing ACOG, *Standards for Obstetric-Gynecologic Services* (5th ed. 1982)). Yet ACOG would now like this court to find that the ambulatory surgical center requirements in HB 2 are medically unnecessary. ACOG may have loosened its standards since 1983, but medical testimony before the Texas Legislature and in the court record below

(Continued on following page)

Further, this Court has on at least two occasions utilized its decision in *Casey* to support the wide discretion standard. In the 1997 case *Mazurek v. Armstrong*, plaintiffs challenged a Montana law restricting the performance of abortions to licensed physicians and claimed it had an invalid purpose because "all health evidence" contradicted the State's claim that there was a health basis for the law. 520 U.S. 968 (1997). This Court held that *Casey* "squarely foreclosed" this argument. *Id.* at 973.[15] In other words, deference to the State is appropriate even when a challenger alleges that a law is not based upon scientific fact. Then in *Gonzales*, this Court specifically held that the "traditional" wide discretion

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demonstrates that not all medical professionals agree. *See* Part III, *infra*; *see also* Brief of *Amici Curiae* Texas Legislators, filed in support of Respondents; Brief of *Amici Curiae* American Association of Pro-Life Obstetricians and Gynecologists, American College of Pediatricians, Christian Medical & Dental Association, Catholic Medical Association, and Physicians for Life, filed in support of Respondents.

[15] In *Mazurek*, the Court cited *Casey* for the holding that "cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." *Mazurek*, 520 U.S. at 973 (citing *Casey*, 505 U.S. at 885) (italics omitted). The Court also stated, "Respondents fall back on the fact that an anti-abortion group drafted the Montana law. But that says nothing significant about the legislature's purpose in passing it." *Id.* Indeed, the whole of this Court's abortion jurisprudence undermines each and every claim asserted by Petitioners and their *amici*.

rule is "consistent with *Casey*." *Gonzales*, 550 U.S. at 163.

Other federal courts have followed this Court's lead and provided deference to state legislatures when medical disagreement exists. In *Greenville Women's Clinic v. Bryant*, the Fourth Circuit reviewed South Carolina's comprehensive abortion clinic regulations, which included a provision requiring that every clinic be affiliated with a physician who has admitting privileges at a local hospital. 222 F.3d 157, 161 (2000). The regulations also provided fire safety and "design and construction" (*i.e.*, physical plant) requirements. *Id.* at 161-62. The federal district court had held that the regulations served "no legitimate state interest given the lack of evidence that the regulation will operate to improve the health care currently being received in this state." *Id.* at 163. However, the Fourth Circuit, properly applying this Court's abortion jurisprudence, rejected the district court's flawed conclusion.

After noting that the plaintiffs undertook a "heavy burden" in bringing the facial challenge against South Carolina's clinic regulations, the Fourth Circuit stated that the scope of a woman's "right" to terminate a pregnancy "is framed by the State's 'legitimate interests from the outset of the pregnancy in protecting the health of the woman. '" *Id.* at 163, 165-66. In upholding the regulations, the Fourth Circuit held, "that not all healthcare professionals agree with the adoption of each specific aspect of the [clinic regulations] is immaterial in light of South Carolina's

'considerable discretion' in adopting licensing requirements aimed at the health of women seeking abortion." *Id.* at 169 (citing *Simopoulos*, 462 U.S. at 516). The Circuit further held that there is no requirement that a state refrain from regulating abortion facilities until a public-health problem manifests itself. *Id.* In the same vein, a state cannot be required to prove the effectiveness of a regulation in addressing a public health concern that may not have manifested itself yet.

The Eighth Circuit has also aptly applied this Court's "wide discretion" standard in its abortion jurisprudence. In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, the Eighth Circuit reviewed South Dakota's informed consent language requiring that women contemplating abortion be informed of an increased risk of suicide ideation and suicide following abortion. 686 F.3d 889 (2012). In upholding the requirement, the Eighth Circuit noted that this Court "'has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty,' and '[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.'" *Id.* at 899-900 (quoting *Gonzales*, 550 U.S. at 163-64).

Specifically, the Eighth Circuit held that the plaintiffs challenging the suicide advisory would have to show that any medical and scientific uncertainty had been resolved into a certainty against any causal role of abortion – "that abortion has been ruled out, to

a degree of scientifically accepted certainty, as a statistically significant causal factor in post-abortion suicides" – and the plaintiffs could not meet that high burden. *Id.* at 900. Likewise, the presence of medical disagreement in this case imposes an incredibly high burden on the Petitioners. They must demonstrate that all medical evidence is resolved in their favor – a burden that they did not and cannot meet.

The Fifth Circuit also has a history of properly weighing the states' legitimate interests and providing appropriate deference to state legislative decisions. In upholding HB 2's admitting privileges provision against a facial attack in *Abbott II*, the Fifth Circuit held, "It is not the courts' duty to second guess legislative fact-finding, 'improve' on, or 'cleanse' the legislative process by allowing relitigation of the facts that led to the passage of a law." *Abbott II*, 748 F.3d at 594 (citing *Heller v. Doe*, 509 U.S. at 320, for the principle that a state "has no obligation to produce evidence to sustain the rationality of a statutory classification"). Because a determination of rational basis does not lend itself to evidentiary inquiry in court, a state is not required to "prove" that the objective of a regulation would be fulfilled. *Id.* (citing *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), for its holding that "a legislative choice is not subject to courtroom fact-finding"). A court is not to replace legislative predictions or calculations with its own, "else it usurps the legislative power." *Id.* Rather, "judicial deference to legislative choice 'preserve[s] to the legislative branch its rightful

independence and its ability to function.'" *Id.* (citing *F.C.C.*, 508 U.S. at 315). Further, the Fifth Circuit held that the fact that reasonable minds differ on legislation suffices to prove that a regulation has a rational basis – and, in logical extension, it supports the deference that must be provided to the State. *Id.*

On the other hand, discussion – not to mention application – of the "wide discretion" standard is glaringly missing from the recent Seventh and Ninth Circuit decisions touted by the Petitioners. *See Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015); *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014).[16] Neither court addressed the "wide discretion" language in *Gonzales*, ignoring it completely.[17] Instead, those courts erroneously adopted a strict scrutiny approach that has been explicitly rejected by this Court.

Both the Seventh and Ninth Circuits improperly shifted the burden to the State to prove the rationality

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[16] Notably, the decision in *Humble* was not on the merits or after examination of a complete record, but involved a preliminary injunction. *Humble*, 753 F.3d 905.

[17] Unlike the majority opinion in *Schimel*, the dissenting opinion examined in detail this Court's precedents and cited the wide discretion afforded to states under both *Mazurek* and *Gonzales*. *Schimel*, 806 F.3d at 922 (Manion, J., dissenting). *See also id.* at 931 (referring to the majority opinion's analysis as a "home-brewed" undue burden standard that "finds no basis in *Gonzales*, *Casey*, or any other case law other than that which it created").

of its regulation – applying that burden "exactly backwards" and rejecting this Court's precedent in *Mazurek*. *See Schimel*, 806 F.3d at 924, 931 (Manion, J., dissenting). Both Circuit courts undermined the states' Court-affirmed interests and have now jeopardized the states' ability to enact regulations aimed at protecting maternal health. *Id.* at 924-25. They also acted contrary to this Court's directive that medical uncertainty provides a "sufficient basis" to conclude, in a facial attack, that an abortion regulation does not impose an undue burden. *Gonzales*, 550 U.S. at 164. Likewise, Petitioners are urging this Court to undermine the states' legitimate interests and follow the Seventh and Ninth Circuits in rejecting this Court's longstanding abortion precedents.

III. Petitioners urge the adoption of a strict scrutiny standard because the legislative record and trial court testimony foreclose their ability to meet the legal standards established by this Court in *Roe*, *Casey*, and *Gonzales*

Contrary to Petitioner's claims, the Fifth Circuit properly followed and applied this Court's precedents. The Fifth Circuit carefully examined this Court's abortion jurisprudence in the decision below, including a discussion of the "considerable discretion" and "wide discretion" afforded states by this Court in *Simopoulus* and *Gonzales*. *Whole Woman's Health v. Cole*, 790 F.3d 563, 571, 575 (5th Cir. 2015). Citing *Mazurek* and *Gonzales*, the Fifth Circuit ruled that

the medical uncertainty demonstrated in the record here does not lead to the conclusion that the law is unconstitutional. *Id.* at 585 (citing *Gonzales*, 550 U.S. at 163; *Mazurek*, 520 U.S. at 973).[18] Indeed, *Gonzales*, *Mazurek*, *Simopolous*, and *Roe* each support comprehensive clinic regulations and admitting privileges requirements aimed at protecting the health and life of the woman.

Petitioners' proffered standard, which would require the State to prove the effectiveness of its enacted laws in meeting a desired state interest, not only undermines the State's legitimate interests in protecting maternal health, but also effectively guts this Court's directive that courts review the *rational basis* supporting an enacted regulation. Indeed, there is no reason to consider whether the State has a rational basis if the next step in the undue burden inquiry is to require the State to prove the effectiveness of a regulation (*i.e.*, strict scrutiny). The less stringent standard is enveloped in the stricter standard. That

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[18] This was not the first time that the Fifth Circuit has properly examined and relayed this Court's standard of review in abortion cases. In *Abbott II*, the Fifth Circuit summarized this Court's precedent as follows:

> Before viability, the State may not impose an "undue burden," defined as any regulation that has the purpose or effect of creating a "substantial obstacle" to a woman's choice. In *Gonzales*, the Court added that abortion restrictions must also pass rational basis review.

Abbott II, 748 F.3d at 590 (citations omitted).

cannot possibly be what this Court intended, and adopting Petitioners' "home-brewed" standard would effectively turn this Court's abortion jurisprudence on its head. *Schimel*, 806 F.3d at 931 (Manion, J., dissenting).

Simply, the Petitioners urge the adoption of a strict scrutiny standard because they cannot meet the legal standards explicit in *Roe*, *Casey*, and *Gonzales*. *See* Parts I and II, *supra*. The most Petitioners can demonstrate is that there is medical disagreement in the medical community – a disagreement which must be resolved in favor of the State. Moreover, such medical disagreement provides "sufficient basis" to conclude, in Petitioners' facial attack, that there is no undue burden. *Gonzales*, 550 U.S. at 164.

The legislative record and the record before the trial court confirm that the Fifth Circuit afforded proper deference to the state legislature. For example, before the enactment of HB 2, Senator Donna Campbell, MD, an emergency room physician, spoke on the Senate floor about the reasonableness of requiring abortion clinics to meet the same standards as ambulatory surgical centers (ASCs).[19] She explained that, in her 23 years as an ER doctor, she had personally cared for women with physical emergencies

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[19] Floor Statement of Senator Donna Campbell, MD (July 12, 2013), available at http://tlcsenate.granicus.com/MediaPlayer.php?view_id=9&clip_id=500 (beginning at 8:42:40) (last visited Jan. 25, 2016).

resulting from abortion. She further explained the reasonableness of the standards. Back-up generators are necessary in case a procedure is in progress when the electricity goes out. Wider hallways are necessary in order to bring in a gurney in the case of a medical complication. Air flow systems assist in decreasing the risk of infection. Requirements as simple as lockers and janitors' closets are necessary in order to keep contaminates out of the operating room. Significantly, Senator Campbell testified that medical organizations like the American Medical Association (AMA) do not speak for all doctors.

Likewise, Dr. Mikael Love, an obstetrician/gynecologist in Austin – who is a Fellow in the American Congress of Obstetrics and Gynecology and the Chairman of the CME Committee which oversees physician education for seven area hospitals in Central Texas – testified before the Committee on State Affairs in favor of the admitting privileges requirement.[20] Specifically, he related that, as chairman of the OB/GYN section at his hospital, he has signed off on the admitting privileges of abortion providers. Importantly, he testified that requiring hospital

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[20] Testimony of Dr. Mikael Love before the Committee on State Affairs (July 2, 2013), available at http://tlchouse.granicus.com/MediaPlayer.php?view_id=28&clip_id=6609 (beginning at 3:20:30) (last visited Jan. 25, 2016).

privileges for physicians who perform abortions is the standard of care.[21]

The court record below also reflects the medical testimony that was provided in favor of the provisions in HB 2. The State supported the application of ambulatory surgical center (ASC) standards to abortion facilities through "expert testimony that the sterile environment of an ASC was medically beneficial because surgical abortion involves invasive entry into the uterus, which is sterile." *Cole*, 790 F.3d at 579. Likewise, the State offered expert testimony that the admitting privileges requirement "leads to greater continuity of care and 'assures peer-review of abortion providers by requiring them to be credentialed and hold admitting privileges at a local hospital, thereby protecting patients from less than qualified providers.'" *Id.* That medical testimony is further buttressed by the medical *amicus* briefs filed in this Court supporting HB 2 and the State of Texas.

Such medical evidence defeats Petitioners' legal claims. The most Petitioners can demonstrate is that their medical experts disagree with the State's medical experts. That disagreement places this case squarely within the wide deference this Court guarantees to state and federal lawmakers. *See Gonzales*, 550 U.S. at 163; *Mazurek*, 520 U.S. at 973; *Simopolous*, 462 U.S. at 516. Petitioners may (erroneously) claim

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[21] For more on the legislative record, *see* Brief of *Amici Curiae* Texas Legislators, filed in support of Respondents.

that all health evidence contradicts the State's claims, but *Casey* "squarely foreclose[s] that claim." *See Mazurek*, 520 U.S. at 973.

Because Petitioners are hindered by this Court's abortion jurisprudence, they seek to have this Court overturn its precedents and reject legislative deference. This effort must fail.

CONCLUSION

For the reasons above, this Court should affirm the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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